STATE OF MICHIGAN

COURT OF APPEALS

LEO N. WILEY, Petitioner-Appellee,	UNPUBLISHED March 24, 2011
v	No. 293125 Ingham Circuit Court
CIVIL SERVICE COMMISSION, Respondent-Appellant.	LC No. 08-001000-AA

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

This appeal presents a dispute concerning the propriety of discipline imposed on petitioner, a longtime Department of Corrections (DOC) employee. The DOC discharged petitioner after he pleaded guilty in March 2006 of attempted third-degree child abuse, MCL 750.136b(5), MCL 750.92. Petitioner filed a grievance, which was denied, then sought review before a Department of Civil Service (DCS) hearing officer, who granted the grievance and converted the DOC penalty of dismissal to a suspension from work for 20 days. The DOC appealed to the Employment Relations Board (ERB), which recommended reinstatement of petitioner's dismissal, in part because the hearing officer had applied incorrect legal standards in a manner that affected the DOC's substantial rights. Respondent adopted the ERB's recommendations, prompting petitioner to pursue a circuit court appeal. The circuit court concluded that although the DOC possessed just cause to discipline petitioner, "the department imposed an arbitrary and capricious penalty based on the fact this punishment was not in line with similar misdemeanor cases." This Court granted respondent's application for leave to appeal, and we now reverse and remand.

A circuit court possesses the authority to review a decision by respondent to ascertain whether the ruling was "'authorized by law'" and was "'supported by competent, material and substantial evidence on the whole record.'" *York v Civil Service Comm*, 263 Mich App 694, 698; 689 NW2d 533 (2004), quoting Const 1963, art 6, § 28; see also MCL 600.631, MCL 24.306. Substantial evidence means "that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance." *Widdoes v Detroit Pub Schools*, 242 Mich App 403, 408-409; 619 NW2d 12 (2000) (internal quotation omitted). The circuit court must affirm the commission's decision "if supported by evidence that a reasonable mind would accept as adequate to support the decision." *Hanlon v Civil Service Comm*, 253 Mich App 710, 727; 660 NW2d 74 (2002).

A different standard governs this Court's review of a circuit court's review of an agency decision.

> [W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with a definite and firm conviction that a mistake has been made. [*Boyd v Civil Service Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996).]

Petitioner, a DOC employee, belonged to the state classified civil service and was "subject to the grievance procedure for the classified service." *Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 77-78; 630 NW2d 650 (2001). Respondent "regulates the terms and conditions of employment in the classified service and has plenary and absolute authority in that respect." *Id*. at 79. "Under Michigan law, civil service employees are guaranteed continued employment absent just cause for dismissal." *York*, 263 Mich App at 703.

Following petitioner's guilty plea, the DOC charged petitioner with violating DOC work rules 5, "Conduct Unbecoming a Department Employee," and 22, "Misdemeanor or Other Restrictions." The text of work rule 5 sets forth as follows:

> An employee shall not behave in an inappropriate manner or a manner which may harm or adversely affect the reputation of the Department. *Employees have a special* responsibility *to support and uphold the law through their own* actions and personal conduct. Employees who are found in violation of Department rule or Department policy, or are convicted of criminal offenses, may also be found in violation of this rule, along with Civil Service Commission Rule 2-10.3(b). If an employee is arrested or charged for a criminal offense the behavior shall be investigated to determine whether such activity violates this rule. If the investigation concludes the behavior violates this rule, whether it occurred on or off the job, disciplinary action may result regardless of the prosecutorial action or court disposition of the arrest or charges. [Emphasis in original.]

Work rule 22 states, in pertinent part:

> Any conduct by an employee, whether on one's own time or in connection with official duties, which results in a misdemeanor conviction, whether by guilty plea, no contest plea or trial, including misdemeanor traffic offenses, is prohibited. If the conviction involves a controlled substance, the employee shall be discharged.

Respondent avers that "[c]ompetent, material and substantial evidence demonstrates [petitioner] violated DOC work rules," respondent's "final decision to dismiss [petitioner] did

not violate a Civil Service Rule, did not violate an agency work rule, and was not arbitrary and capricious," and the circuit court's "artificial limitation of the DOC's range of disciplinary recourse is contrary to express DOC authority and thereby constitutes reversible legal error." After the DOC investigated what discipline to impose on petitioner and opted to discharge him, petitioner filed a grievance, which a labor representative dismissed. The labor representative summarized as follows:

> On the departmental investigative questionnaire, the Grievant admits to striking his son with a belt. The Grievant also admits he was arrested by the police, and he admits he pled guilty to the misdemeanor charge of Attempted Child Abuse 3rd Degree. Upon review of the disciplinary packet, the Grievant's prior disciplinary record, the nature of the conduct, the discipline imposed upon other employees for similar violations, and any mitigating or aggravating circumstances, it was determined discharge was the appropriate disciplinary action for the violation of Work Rules #5 and #22.
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> The Grievant has not presented any evidence to substantiate a violation of Civil Service rules and/or regulations. The discharge was for cause. Therefore, this grievance is denied.

Petitioner then sought a grievance hearing before a DCS hearing officer. As reflected in the hearing officer's written grievance decision, petitioner "did not contest the fact that some disciplinary action was warranted but did dispute the severity of the discipline." The hearing officer commenced his analysis by summarizing his view of the controlling legal principles:

> An analysis of Hearing Officer, ERB and Civil Service Commission decisions, both those generally available and those specifically cited by the parties, reveals that there exsists [sic] a group of specific types of factors which must be present in order to justify a misdemeanor charge, which would normally be cause for written reprimand or short suspension, rising to a dismissal action which would ultimately be upheld on appeal. These aggravating factors may either stand alone, as with a prior poor disciplinary record, or as other events/ conditions in connection with the commission of the misdemeanor action, which factors are sufficient to make a dismissal action supportable.

The hearing officer identified the aggravating factors, "which may or may not be exclusive," as "[p]rior serious disciplinary actions active in the employee's record," "[e]xistence of the use or possession of illegal substances in the misdemeanor activities," "[t]he use of dangerous weapons in the execution of the misdemeanor," and "[e]vents of a sexual nature either as involved in the events under consideration or in the prior record of the employee." In the hearing officer's view, "[I]n order for an adjudicating officer to uphold a misdemeanor related discharge the DOC must prove one or more of these above conditions exists and are [of] such importance so as to allow the elevation of the misdemeanor discipline to a higher level, in this case disciplinary discharge . . . ." The hearing officer then proceeded to discount the record support for the "aggravating factors" taken into account by the DOC in fashioning petitioner's discipline: child abuse, employment of a weapon, resulting injuries, "[p]rosecuting attorney considered this misdemeanor to be a felony," "[u]ntruthfulness of the grievant to police officers," and

"[r]epetitive nature of the abuse of the boy." The hearing officer concluded that "[t]he aggravating factors relied upon by DOC to justify a dismissal do not rise to the level of severity cited in prior cases involving misdemeanor charges where dismissal was upheld in the appeal process," and that "a 20-day suspension is an appropriate penalty with restitution in full . . . ."

The DOC appealed to the ERB, which found "that the [hearing officer] used the wrong legal standards and analyses in his decision." In relevant part, the ERB explained as follows:

> The [hearing officer's] first major error was adopting the wrong legal standard for analyzing the severity of the punishment. The [hearing officer] incorrectly held that there were "a group of specific types of factors which *must be present* in order to justify a misdemeanor charge . . . rising to a dismissal . . . ." [Emphasis in original.]
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> The Board first notes that there is no rule or regulation requiring that one or more of these factors are necessary to enhance a penalty. The Board also notes that the practical effect of the [hearing officer's] decision is to limit artificially the factors the DOC may consider when evaluating the penalty for a misdemeanor offense. . . .
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> . . . The [hearing officer's] second error was to shift the burden of proof from [petitioner] to [the] DOC. [Petitioner] is required to prove that the penalty was arbitrary and capricious. . . .
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> Using the correct burden of proof, the Board's review of the record reveals that [petitioner] failed in his proofs. On the contrary, [the] DOC demonstrated a rational and factual basis for using each of the various aggravating factors considered in its penalty decision. Thus, [petitioner] failed to prove that the DOC's decision to discharge him was arbitrary and capricious or otherwise erroneous.
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> . . . The [hearing officer's] third error was failing to consider the aggravating factors used by [the] DOC is [sic] setting [petitioner's] penalty. . . . It is the Board's view that the [hearing officer] abused its discretion in rejecting or discounting [the DOC's] use of the following aggravating factors: [injuries to the child, felony-like misdemeanor charge, lying to the police, repeated child abuse, use of a weapon, and child abuse.]
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> . . . Such circumstances incontestably demonstrate conduct unbecoming a DOC employee and violate both Work Rule 5 and Work Rule 22. The [hearing officer's conclusion that these behaviors and circumstances cannot ever support dismissal for misdemeanor charges is incorrect. The [hearing officer's] further conclusion that these factors are simply not serious factors worthy of consideration when deciding how to punish [petitioner] is also incorrect.

The ERB upheld the DOC's dismissal of petitioner:

> . . . As we have noted, the primary responsibility for determining the severity of a penalty rests with the appointing authority and the standard for a hearing officer reviewing the severity of a penalty is that of "arbitrary and capricious." The Board has determined from the record that [DOC] personnel had a rational basis for considering each of the factors cited as an aggravating factor when considering the proper penalty. That is, [DOC] personnel did not act in an arbitrary and capricious manner when they made the decision to dismiss [petitioner].
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> When evaluating the proportionality of a disciplinary penalty, one factor to consider is whether the penalty clearly exceeds the range of penalties generally recognized as fair and reasonable for the misconduct alleged. . . .
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> After reviewing the facts and arguments in this matter, the Board is left with an abiding belief that, when considering all of the circumstances of this case, dismissal from the classified service is not a disproportionately extreme penalty for the misconduct alleged. In other words, even given [petitioner's] long work history, the Board does not find that the [DOC]'s decision to dismiss [petitioner] from the classified service is so punitive or extreme as to clearly exceed the range of penalties that is generally accepted as fair and reasonable. On this record, the Board finds there is a preponderance of substantial, material, and competent evidence to support [the DOC's] decision to impose the penalty of dismissal.

Petitioner appealed to the circuit court. At the close of an evidentiary hearing, the court concluded that the DOC did possess just cause to impose discipline, but that the dismissal of petitioner amounted to an arbitrary and capricious penalty. The court reasoned:

> I think that the range of reprimand to suspension makes sense on a misdemeanor. He did go through probation, successfully completed it, has custody of his child, and although I'm not going to relitigate, nor should I, nor do the rules provide that I step into the shoes of everybody that's heard this, I certainly, based on the totality of the circumstances I see, somehow child abuse has been set up to be like a drug offense and calls for discharge of a misdemeanor. I'm the first one as a district court judge and as a circuit court judge to take the harshest penalty I can for child abuse, but here it seems he's paid the penalty and he has been set apart from others who are similarly situated, so I can't sit here and abide by what's happened here. I think he's entitled to receive his employment back based on the record that's made here. . . .

The circuit court correctly observed that the DOC and respondent had just cause to impose discipline on petitioner, at least for his undisputed violation of DOC work rule 22. Civil Service Rule 2-6.1 addresses the DOC's disciplinary options under these circumstances:

> (a) An appointing authority may discipline a classified employee for just cause.

* * *

(c) Permissible discipline includes, but is not limited to, the following:

* * *

(6) Dismissal from the classified service.

(d) The appointing authority shall impose discipline in a manner consistent with the civil service rules and regulations and any applicable agency work rules. When appropriate, an appointing authority shall use corrective measures and progressive discipline. *However, if an infraction is sufficiently serious, an appointing authority has the discretion to impose any penalty, up to and including dismissal, provided the penalty is not arbitrary and capricious.* [Emphasis added.]

Respondent's dismissal of petitioner thus has a legal foundation in applicable DOC work rules and Civil Service Rule 2-6.1. Our review of the record reveals that the circuit court misapplied the law that it must apply on appeal of an agency ruling. *Boyd*, 220 Mich App at 234. The DOC and the ERB documented multiple grounds present in this case that rendered petitioner's conduct sufficiently serious to warrant dismissal, as contemplated in Civil Service Rule 2-6.1(d), specifically petitioner's infliction of injuries on his child in the course of a beating with a belt, testimony suggesting that petitioner had beaten his child in the past, petitioner's untrue denials to the police that he had hit his child, and the serious nature of the original third-degree child abuse charge against petitioner, which carries a two-year maximum term of imprisonment. MCL 750.136b(6). However, the circuit court apparently misapplied the "competent, material and substantial evidence on the whole record" standard that governed its review of respondent's disciplinary decision; the court simply overlooked the serious circumstances respondent had considered in opting to dismiss petitioner and made no reference to whether the aggravating circumstances had the requisite evidentiary support in the whole record. *York*, 263 Mich App at 698.

With respect to the circuit court's interpretation of DOC policy as dictating that "the only misdemeanors which *force immediate dismissal* are charges dealing with drugs, guns, and sexual offenses," even assuming the veracity of this observation, such a policy does not preclude the DOC and respondent from discharging an employee convicted of a misdemeanor. The language of Civil Service Rule 2-6.1(d), and a 2003 DOC policy directive concerning employee discipline contained in the administrative record, both expressly contemplate that aggravating or distinctly serious circumstances may merit a more severe punishment.[1] Petitioner emphasizes this Court's

[1] The DOC policy directive advises in ¶ AA, under the heading "Imposition of disciplinary sanctions," that "[e]mployees who commit similar rule violations should generally receive similar discipline for their conduct," and that "[a]n employee who continues to commit rule violations should generally receive more severe discipline than an employee who commits a

observation in *Battiste v Dep't of Social Servs*, 154 Mich App 486, 493; 398 NW2d 447 (1986), that "[a] single incident of misconduct may be so gross and egregious as to warrant dismissal. However, where an employee's previous record is unblemished, we believe that a department's failure to *consider* progressive discipline renders its decisionmaking arbitrary." (Emphasis in original). The administrative record before us at least reasonably suggests that the DOC considered discipline short of termination, but that the instant combination of aggravating factors precluded an alternative other than discharge.

In summary, the circuit court clearly erred when it disregarded the aggravating factors on which the DOC and respondent relied. The circuit court's incorrect application of the law effectively resulted in its unlawful supplanting of respondent's disciplinary investigation and decisionmaking process. *Ranta v Eaton Rapids Pub Schools Bd of Ed*, 271 Mich App 261, 265; 721 NW2d 806 (2006). Accordingly, we vacate the circuit court's order reversing petitioner's discharge.

Respondent lastly maintains that the circuit court found the record before it inadequate and, therefore, should have remanded the case for expansion of the record in conformity with MCL 24.305.[2] The circuit court held a hearing on April 1, 2009 to address the propriety of petitioner's discharge. Although the circuit court that day found petitioner's discharge unsustainable, it allowed respondent's counsel an additional two weeks to present case law supporting the DOC's position that dismissal was warranted under the circumstances of this case. At the next hearing, respondent's counsel did suggest that the court remand the case, but counsel identified no specific, material evidentiary need for a remand. Consequently, we detect no error to the extent that the circuit court viewed the instant record adequate for its decision and declined

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single rule violation . . . ." However, the paragraph also contemplates that a "finding of . . . aggravating circumstances . . . [may] support a departure from the discipline identified for the rule violation."

[2] MCL 24.305 reads as follows:

> If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.

respondent's remand proposal. See *Kassab v Acho*, 125 Mich App 442, 455; 336 NW2d 816 (1983) ("Once a reviewing court knows that an administrative agency's record was incomplete or inadequate, the court is mandated to remand the matter.").

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher